

228865

BAKER & MILLER PLLC

ATTORNEYS and COUNSELLORS

2401 PENNSYLVANIA AVENUE, NW
SUITE 100

WASHINGTON, DC 20037

TELEPHONE (202) 663-7820

FACSIMILE (202) 663-7849

William A. Mullins
E-Mail: wmullins@bakerandmiller.com

Direct Dial: (202) 663-7823

February 22, 2011

VIA E-FILING

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

ENTERED
Office of Proceedings
FEB 23 2011
Part of
Public Record

Re: STB Ex Parte No. 697, Amtrak Emergency Routing Orders

Dear Ms. Brown:

In accordance with the decision served on January 6, 2011, in the above-referenced proceeding, please find enclosed the Reply Comments of The Kansas City Southern Railway Company ("KCSR"). If there are any questions concerning the enclosed filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosures

cc: W. James Wochner
David C. Reeves

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 697

AMTRAK EMERGENCY ROUTING ORDERS

REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

**ENTERED
Office of Proceedings**

FEB 23 2011

**Part of
Public Record**

**W. James Wochner, Esq.
David C. Reeves, Esq.
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
P.O. Box 219335
Kansas City, MO 64121-9335
Telephone: (816) 983-1324
Facsimile: (816) 983-1227**

**William A. Mullins, Esq.
Robert A. Wimbish, Esq.
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Telephone: (202) 663-7823
Facsimile: (202) 663-7849**

**Attorneys for The Kansas City Southern
Railway Company**

Dated: February 22, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 697

AMTRAK EMERGENCY ROUTING ORDERS

REPLY COMMENTS OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY

Pursuant to the Surface Transportation Board's ("STB's" or "Board's") Notice of Proposed Rulemaking published January 6, 2011, in the above-captioned matter (the "NPRM"), The Kansas City Southern Railway Company ("KCSR") submits this reply to the opening comments filed in response to the Board's proposal to establish rules to govern Amtrak Emergency Routing Orders under 49 U.S.C. §24308(b).

Background and Summary

The Board's proposed rules aim to establish a formal and orderly process to govern Amtrak requests for emergency routing orders where the detour host either objects to Amtrak's detour proposal or has not responded to Amtrak's detour request. In its February 7, 2011 opening comments, KCSR cautioned that the process outlined in the NPRM does not adequately protect a potential host carrier from liability and could force a would-be host carrier and Amtrak passengers into unsafe situations. On the other hand, Amtrak essentially argues in its opening comments for the preservation of the status quo and its unfettered right to obtain access to a host carrier's line without the need to have any liability or compensation provisions in place before conducting re-route operations and without proper due diligence regarding the operating characteristics of the lines on which Amtrak seeks access. Upon review of the opening comments, it remains clear to KCSR that the proposed process, especially if the process as

advocated by Amtrak were adopted, does not ensure that Amtrak re-route requests would be handled fairly and with appropriate regard for safe operations and freight carrier input. As such, KCSR believes the Board should adopt changes in its proposed rules to accommodate the concerns expressed in its comments.

Reply Comments

Amtrak continues to favor what is essentially a status quo approach which allows immediate re-routing authority. The fundamental justification for a rush to an STB-issued emergency order is that Amtrak does not wish to subject its passengers to delay and inconvenience. It is understandable that Amtrak would seek to maintain a good level of customer service in the face of unforeseen service disruptions, but this is no basis to subject its passengers and the detour host's freight operations to unacceptable risk. Instead, the emergency rules must put safety first. Before this Board grants Amtrak emergency re-route authority, Amtrak should be required to (1) demonstrate that the proposed re-route lines are safe for Amtrak operations, including a certification that Amtrak will operate on the re-route line according to the host carrier's operating rules for freight trains; (2) that it will fully indemnify the host carrier and provide proof of adequate insurance coverage *before* the STB grants the re-route authority; and (3) that a true emergency exists.

A. Amtrak Should Establish That Its Proposed Re-Route Operations Would Be Safe

Consistent with KCSR's opening comments, the Board should allow an affected carrier to make its views and concerns known *before* the Board grants Amtrak access to its lines.¹

¹ Amtrak pays lip service to the notion of a complete record, stating that it would not object to supplying an affected carrier with a written application containing the information set forth in proposed §1034.2(a)-(c). But Amtrak would treat such service requirements as mere formality, because Amtrak wants the Board to order a detour in the absence of the freight carrier's response to the application for an emergency order.

Without affected carrier input, the Board cannot ascertain whether the detour that Amtrak may be advancing can be effectuated safely, nor can the Board ensure that a potential host carrier will be protected in the event of an accident caused by Amtrak re-route operations.

Amtrak complains that requiring a complete record and allowing an opportunity for meaningful comment by a potential host carrier would be contrary to the business needs of Amtrak and “the travelling public” (Amtrak Opening Comments at 3), but Amtrak does not consider whether the process would ensure the safety of its passengers, and Amtrak’s comments reflect absolutely no regard for the interests of the railroad that Amtrak would propose to operate over, including impacts on current freight operations and shippers, and the suitability of the detour line to host passenger trains (particularly at typical passenger train speeds). This is precisely why the Board should require Amtrak to address the potential safety and operating impacts of a requested detour arrangement and allow the affected carrier to respond before the Board acts. Amtrak should also be required to certify that it will comply with the host carrier’s freight train operating parameters.

The Board must recognize that ordering Amtrak onto another carrier’s track without appropriate advance notice to the host carrier with a real opportunity for the affected carrier to respond can and does pose unacceptable safety risks. This is especially so where the detour carrier has little if any prior experience with Amtrak, and where the targeted detour line is not well-suited for handling passenger trains. For example, if Amtrak sought an order over a preferred detour route that has not previously handled passenger trains, is the Board simply to assume in the absence of freight carrier input that the detour route is capable of safely hosting Amtrak trains? Is the Board to assume that Amtrak is fully aware of conditions on the detour

route and the operating rules and practices in effect on that line? Such assumptions would be unwise and exceedingly dangerous.

Amtrak seems to presume familiarity with the operating characteristics of the detour route it would propose to use. But the Board should not so presume; rather Amtrak should, at a minimum, demonstrate familiarity with the detour route's operating characteristics and demonstrate that its re-route operations can be done safely. Further, the detour carrier must be afforded an opportunity to address the issue and to explain whether the detour would or would be a safe alternative to Amtrak's regular route, and Amtrak should certify that it will comply with the host carrier's operating rules and procedures.

In its opening comments, KCSR discussed the differences between maximum permitted freight and passenger operating speeds on different Federal Railroad Administration ("FRA") classes of track, noting that Amtrak arguably could operate at faster speeds on a given rail line than could a freight train. KCSR noted the safety risks inherent with the addition of faster passenger trains through communities not accustomed to them. One of these risks results from the fact that the location of devices that trigger active grade crossing protection (i.e., lights and gates) is determined in light of the speed of trains using the track. In the case of a rail line that does not normally host passenger trains, the grade crossing signals and gates are typically calibrated to the lower speeds allowed for freight train. If the Amtrak train were to run at a higher speed, such grade crossing protection devices could be ineffective; significantly increasing the risk of a grade crossing accident. This is but one example of the many issues that

Amtrak and a would-be detour carrier must address and resolve *in advance* of any STB-ordered detour operation.²

B. Amtrak Should Provide Full Indemnification And Proof Of Insurance

As noted in its Opening Comments, KCSR believes it is critically important that the Board ensure *before* the issuance of a routing order that the affected carrier is adequately protected by way of full Amtrak indemnity and insurance.³ The Board must bear in mind that Amtrak-related liability is a “but for” proposition for the detour host. That is, but for being required to host detoured Amtrak trains, the host freight carrier would not be exposed to the personal injury and property loss risks, and avoidable costs that arise from the imposition of a detour order.

Thus, Amtrak’s application for issuance of an emergency re-route order should include a certification that Amtrak will provide full liability coverage to the temporary host carrier covering all liability that the host may incur, other than that which may be due to the host’s gross negligence or willful misconduct. *See generally Application of The National Railroad Passenger Corp. Under 49 U.S.C. 24309(A) -- Springfield Terminal Railway Company, Boston*

² Amtrak points to a fairly recent re-routing of Amtrak’s California Zephyr from its regular route via BNSF Railway (“BNSF”) to a detour route over Union Pacific Railroad Company (“UP”) as an illustration of an Amtrak service “emergency” and as support for its position. The example does not support Amtrak’s case. The situation actually appears to have required no Board intervention or order, and seems instead to have been addressed through the mutual consent of the parties (Amtrak makes extensive use of UP lines). In contrast, that example actually supports KCSR’s safety point. For example, what if the situation had been reversed, such that the California Zephyr regularly operated over UP, that the line suddenly became impassable, and Amtrak had sought, without notice to BNSF, to use BNSF’s route via Burlington, Iowa, which at that time was closed due to bridge damage? A detour order over BNSF would have been of no use, and, if actually one were issued in such a situation, Amtrak passengers could have been put at peril due to the Board’s incomplete understanding of the safety issues involved. Insisting on the opportunity for host carrier input would prevent this lack of information from occurring.

³ It would be impracticable, if not impossible, for Amtrak to seek to add an affected carrier to its insurance coverage after an accident or similar incident, so appropriate insurance arrangements must be made in advance.

and Maine Corporation, and Portland Terminal Company, 3 S.T.B. 157, 1998 WL 1799020 (1998). Moreover, the Board should require that, to the extent this requirement is fulfilled through insurance, such insurance be in place and applicable to the temporary host before Amtrak begins operating on the temporary host's track, and that Amtrak's application include an insurance certificate naming the temporary host as an additional insured under Amtrak's applicable policies. Likewise, Amtrak's application should also be required to state that Amtrak will bear all costs associated with its operations over the temporary host's track.

C. A True Emergency Should Exist

KCSR noted in its opening comments that a genuine passenger service emergency does not exist merely because Amtrak says it does. 49 U.S.C. §24308 does not define what may constitute an "emergency," and it would be wise for the Board to distinguish between events that may give rise to a genuine emergency, and those that merely subject Amtrak to logistical challenges and its passengers to some delay. For example, Amtrak would have the Board believe that an emergency situation automatically exists where "an Amtrak train filled with passengers is en route and a detour order is required immediately." (Amtrak Opening Comments at 4). Such a situation is not necessarily an emergency, and, in fact, Amtrak can, and oftentimes does in such situations, annul the train and arrange for alternative transportation for its customers, which undercuts the presumption that Amtrak would like the Board to make that a service disruption is, by definition, a service "emergency."⁴ In fact, the cases that Amtrak cites in support of an overly-expansive view of an emergency – The Texas and Pacific Rwy., ICC Service Order No. 1179 (1974); and Amtrak and Boston and Maine Corp., ICC Finance Docket

⁴ By comparison, when one airline's plane has a mechanical issue that makes it unsafe to fly, that airline does not seize another carrier's plane to move the passengers.

No. 31257 – are not useful examples of service emergencies at all, and both cases appear to have been decided with the benefit of a complete record, not on the basis of a telephone call.

Amtrak seeks inappropriately to expand the definition of an “emergency” to situations where the dispute between Amtrak and the would-be host freight carrier is foreseeable and can and should be addressed on the basis of a complete record. For that reason, KCSR objects to Amtrak’s request to remove from the proposed rules any reference to “detour” lines and to the “terms of the detour agreement” (as such terms are found in proposed §§1034.2(b)(3) and 1034.2(b)(5)), because the revisions that Amtrak seeks effectively read out of the equation the essential Amtrak threshold showing of the existence of a real service emergency. Under absolutely no circumstances should the Board provide Amtrak with “no-notice” access to a freight carrier’s lines where the alleged emergency was both foreseeable and where the situation can be resolved on a written record. To be clear, the emergency order remedies that are the subject of this proceeding should be limited to very specific circumstances, and under very clear showings of an emergency. The Board’s authority should not be used as mechanism to bypass foreseeable instances of Amtrak-freight carrier impasse, and should not be used merely to facilitate Amtrak’s sense of what would be convenient for it.

D. Other Elements

Regarding other specific elements of Amtrak’s opening comments:

- KCSR does not object to the revision of proposed new §1115.2(h)(1) to allow Amtrak the right to appeal an emergency routing order decision.
- KCSR objects to Amtrak’s request to be freed of the obligation included in proposed §1034.2(c) requiring Amtrak to certify receipt of service of an application on an “affected rail carrier.” Such dispensation with proper notice raises unacceptable safety risks, and, of course, disregards appropriate due process.

- KCSR does not object to Amtrak's recommendation to change proposed §1034.2(d) to give an affected carrier discretion whether to file a reply to an Amtrak application by changing the word "shall" in that section to "may."

Conclusion

As is explained in detail above, KCSR is gravely concerned with Amtrak's response to this rulemaking, and for that reason, except as is specifically provided otherwise above, KCSR believes that Amtrak's proposals are not acceptable, pose inappropriate safety risks, and allow Amtrak to dispense with affected carrier notification and consultation at the expense of safe operations and due process. As it has done in its opening comments, KCSR again urges the Board to revise the procedural provisions of its proposed rules to – (1) provide a meaningful opportunity for an affected carrier to provide comment before the Board acts in order to ensure that Amtrak's proposed re-route operations can be done safely and in accordance with the host carrier's operation rules and procedures and require Amtrak to certify that it will abide by the host carrier's operating rules and procedures; (2) specifically provide full liability and insurance protection (and cost reimbursement) to the temporary host; and (3) ensure that a true emergency exists and that the reroute is not being done merely for the convenience of the Amtrak passengers.

Respectfully Submitted,



W. James Wochner
David C. Reeves
THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
P.O. Box 219335
Kansas City, MO 64121-9335
Telephone: (816) 983-1303
Facsimile: (816) 983-1227

William A. Mullins
Robert A. Wimbish
BAKER & MILLER PLLC
2401 Pennsylvania Ave., N.W.
Suite 300
Washington, DC 20037
Telephone: (202) 663-7820
Facsimile: (202) 663-7849

Date: February 22, 2011

Attorneys for The Kansas City Southern
Railway Company

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing Reply Comments Of The Kansas City Southern Railway Company upon all other known parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: February 22, 2011



William A. Mullins
Attorney for The Kansas City
Southern Railway Company